

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 10, 2002

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 01-2204

Cir. Ct. No. 00-FA-487

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE MARRIAGE OF:

MICHAEL G. LEMERE,

PETITIONER-RESPONDENT,

V.

MARCIA L. LEMERE,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Brown County:
MARK A. WARPINSKI, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Marcia LeMere appeals the property division, child support and maintenance portions of a judgment dissolving her marriage to Michael LeMere. Marcia argues that the trial court erred by failing to (1) equally

divide the marital estate; and (2) follow the percentage guidelines for child support. Marcia also contends that the trial court erroneously set maintenance at a level that does not equally divide the parties' disposable income. We reject these arguments and affirm the judgment.

BACKGROUND

¶2 The following facts are undisputed. Marcia and Michael were married in June 1981. Two children, Katelyn and Jennifer, were born in 1989 and 1990 respectively. In May 2000, Michael filed for divorce. The parties ultimately entered into a stipulation that addressed legal custody and physical placement of the children, Michael's contribution toward Marcia's attorney fees, the value of the parties' jewelry and the division of certain assets. After a hearing, the trial court divided the marital property, set child support and maintenance. In addition to the court's decisions on these issues, the divorce judgment incorporated the parties' earlier stipulation as well as previous decisions the court had made on various issues. This appeal followed.

ANALYSIS

A. Property Division

¶3 Marcia argues that the trial court erred by failing to equally divide the marital estate. The division of property in a divorce is within the trial court's discretion, and we review for an erroneous exercise of that discretion. *Parrett v. Parrett*, 146 Wis. 2d 830, 843, 432 N.W.2d 664 (Ct. App. 1988). The trial court must begin with the presumption that the marital estate is to be divided equally

between the parties. *See* WIS. STAT. § 767.255(3). However, the court may deviate from this equal division after considering several statutory factors. *Id.* Those factors include the length of the marriage, the property brought to the marriage by each party, and the contribution of each party to the marriage, including economic and child care services. *Id.* It is within the trial court's discretion what weight and effect should be given to the various considerations. *Herlitzke v. Herlitzke*, 102 Wis. 2d 490, 495, 307 N.W.2d 307 (Ct. App. 1981).

¶4 Here, the trial court heard evidence regarding the inception of MGL Fitness, Inc., and Michael's efforts in transforming it into a multi-million dollar business. Michael started the business in approximately 1982, selling weight lifting and associated products at local gyms and bodybuilding shows on days off from his work with the Green Bay Fire Department. Michael's endeavor flourished, allowing him to open his first store in Green Bay, followed by additional store openings in Appleton, Duluth and Wausau. In approximately 1992, Michael left the fire department to devote his full attention to the business.

¶5 The trial court additionally heard evidence regarding Marcia's work history and contributions to the marriage. It is undisputed that Marcia never worked in the business except to fill in on an "as needed" basis. She additionally participated in a few local sporting events and shows at which Michael displayed his products. Michael, however, made all business decisions as to product lines, expansion and location. Ultimately, the trial court awarded 65% of MGL Fitness's value to Michael and 35% of its value to Marcia. The parties' remaining assets were divided equally.

¶6 Marcia challenges the unequal division of MGL Fitness. Specifically, she argues that the trial court erroneously exercised its discretion by failing to consider relevant factors. We are not persuaded. Marcia is essentially objecting to the factors the trial court considered controlling and the manner in which it applied them to the facts. Although the trial court heard evidence concerning other factors, it considered the “parties’ contributions” to be controlling. The trial court noted that it was not ignoring the contributions that Marcia made to the marriage. In fact, awarding Marcia 35% of the business’ value and equally dividing the parties’ remaining assets evinces the court’s consideration of Marcia’s contributions. Moreover, Marcia offers no authority for her proposition that it is an erroneous exercise of the trial court’s discretion to deviate from equal division because one factor dominates. The trial court’s unequal division of MGL Fitness in recognition of Michael’s efforts to ensure financial success of the business was a rational exercise of its discretion.

¶7 Marcia also argues that the trial court erroneously relied on this court’s decision in *Parrett* to unequally divide the marital estate. We disagree. The trial court referred to *Parrett* in its decision, recognizing that in both cases, “the husband’s industriousness and extensive efforts” created a business enterprise. Rather than relying on that case, however, the trial court actually relied on the same factor that the *Parrett* decision turned on—namely, the economic contribution of each party—to award an unequal division of the marital estate. The trial court properly exercised its discretion in determining that Michael’s effort in starting, maintaining and expanding MGL Fitness “from a small box operation to a multi-location, multi-million dollar business” was a substantial economic contribution to the marriage justifying an unequal property division.

B. Child Support

¶8 Marcia argues that the trial court erred by deviating from the percentage guidelines for child support. Marcia requested child support of \$4,000 per month and was awarded child support of \$4,606 per month. Because Marcia's child support request itself constituted a deviation from the percentage guidelines for child support, she is judicially estopped from claiming that the trial court erred by failing to follow the percentage guidelines. Marcia's child support request is an implicit concession that a deviation was appropriate. *See Godfrey Co. v. Lopardo*, 164 Wis. 2d 352, 363, 474 N.W.2d 786 (Ct. App. 1991) (A party may be estopped from asserting a cause in a judicial action or proceeding if he or she maintains positions contrary to or inconsistent with those previously asserted.). Marcia cannot now complain that the trial court did what she conceded it should do, especially where the trial court awarded an amount greater than she requested.

C. Maintenance

¶9 Marcia also contends that the trial court erroneously set maintenance at a level that does not equally divide the parties' disposable income. Specifically, Marcia contends that the trial court erroneously based maintenance on what it believed to be Marcia's present budgetary needs rather than on her anticipated standard of living. We are not persuaded.

¶10 As with property division, the determination of maintenance is addressed to trial court discretion. *Hartung v. Hartung*, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981). In awarding maintenance, the trial court must consider the factors in WIS. STAT. § 767.26.¹ On review, the question is whether the trial

¹ WISCONSIN STAT. § 767.26 provides:

Upon every judgment of annulment, divorce or legal separation, or in rendering a judgment in an action under s. 767.02(1)(g) or (j), the court may grant an order requiring maintenance payments to either party for a limited or indefinite length of time after considering:

- (1) The length of the marriage.
- (2) The age and physical and emotional health of the parties.
- (3) The division of property made under s. 767.255.
- (4) The educational level of each party at the time of marriage and at the time the action is commenced.
- (5) The earning capacity of the party seeking maintenance, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children and the time and expense necessary to acquire sufficient education or training to enable the party to find appropriate employment.
- (6) The feasibility that the party seeking maintenance can become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage, and, if so, the length of time necessary to achieve this goal.
- (7) The tax consequences to each party.
- (8) Any mutual agreement made by the parties before or during the marriage, according to the terms of which one party has made financial or service contributions to the other with the expectation of reciprocation or other compensation in the future, where such repayment has not been made, or any mutual agreement made by the parties before or during the marriage concerning any arrangement for the financial support of the parties.
- (9) The contribution by one party to the education, training or increased earning power of the other.
- (10) Such other factors as the court may in each individual case determine to be relevant.

court's application of the factors achieves both the support and fairness objectives of maintenance. *Forester v. Forester*, 174 Wis. 2d 78, 84-85, 496 N.W.2d 771 (Ct. App. 1993). The first objective is to support the recipient spouse in accordance with the needs and earning capacities of the parties. "The goal of the support objective of maintenance is to provide the recipient spouse with support at pre-divorce standards." *Fowler v. Fowler*, 158 Wis. 2d 508, 520, 463 N.W.2d 370 (Ct. App. 1990). The fairness objective is to ensure a fair and equitable financial arrangement between the parties in each individual case. *King v. King*, 224 Wis. 2d 235, 249, 590 N.W.2d 480 (1999).

¶11 Here, the trial court carefully considered the statutory factors, as well as the support and fairness objectives, and determined that \$615 per month for a period of eight years met those objectives.² Marcia contends that this amount is inadequate to fund her anticipated standard of living of \$16,648 per month. Marcia indicated, however, that her budget of \$16,648 per month was based on the parties' lifestyle immediately prior to the divorce and her anticipated spending post-divorce. Because of the significant non-retirement liquid assets Marcia was awarded, the trial court reasonably adjusted Marcia's budget only for the amount allocated to savings.³ Pursuant to the divorce judgment, Marcia will have \$14,022

² At the time of their divorce, Marcia was a homemaker with a stipulated earning capacity of \$10 per hour, although she did not work outside the home. To the extent that Marcia challenges the trial court's consideration of her imputed income, Marcia raises this argument for the first time on appeal. Therefore, we will not address it. See *Terpstra v. Soiltest, Inc.*, 63 Wis. 2d 585, 593, 218 N.W.2d 129 (1974).

³ The court considered the income that could be realized from those assets and ultimately concluded that the amount of property awarded to Marcia eliminated the need for her to save for her future because she would be able to meet her budget on the income from the investments.

per month, pre-tax, for the needs of herself and her children.⁴ We discern no erroneous exercise of discretion.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

⁴ Marcia will receive \$8,801 in income from investments, \$4,606 in child support and \$615 in maintenance.

